STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SANTANNA NATURAL GAS CORPORATION d/b/a Santanna Energy Services	)	
	)	Docket No. 02-0441
Application for Certificate of Service Authority Under §19-110 of the Public Utilities Act,	)	

SANTANNA NATURAL GAS CORPORATION'S
BRIEF IN REPLY TO THE ATTORNEY GENERAL'S BRIEF
REGARDING SANTANNA'S APPLICATION FOR CERTIFICATION
PURSUANT TO THE ALTERNATIVE GAS SUPPLIER LAW, 220 ILCS 5/19-100, *ET SEQ*.

Santanna Natural Gas Corporation ("Santanna"), by one of its attorneys, Paul F. Markoff, submits this reply to the Attorney General's brief regarding Santanna's application for certification ("*AG Brief*").

Introduction

The Attorney General's 37-page opening brief fails to show that Santanna did not meet the Alternative Gas Supplier Law, 220 ILCS 5/19-100, *et seq*. ("AGSL") certification prerequisites by the end of the 180-day grace period.[1] It also fails even to acknowledge Santanna's service improvements over the course of the grace period. These are not the only flaws that seriously undermine the Attorney General's brief. There are four others that merit mention at the outset. *First*, the Attorney General completely disregards the Commission's administrative promulgation regarding the managerial prerequisite, 83 Ill. Adm. Code §551.100. Importantly, the Attorney General does not dispute that Santanna has made a showing in satisfaction of §551.100.

[1] The Attorney General's brief did not contest Santanna's satisfaction of nine of 11 the prerequisites to certification. The only two challenged prerequisites were the managerial resources and the disclosure of the prices, terms and conditions of Santanna's service.

Second, the Attorney General often makes generalized criticism that does not distinguish between current materials and conduct and dated materials and conduct. Relatedly, the Attorney General fails even to offer any substantive criticism of Santanna's current materials and conduct. This failure is nothing short of a tacit admission that Santanna's most recent materials are AGSL-compliant.

Third, even as to outdated materials, the Attorney General does not analyze the collective effect of Santanna's materials and conduct as they relate to AGSL prerequisites. Most notably, he does not offer any criticism of Santanna's welcome letter, which is a staple of its service in that it goes to every Santanna customer before they began receiving gas from Santanna and provided a detailed explanation of, *inter alia*, Santanna's storage program.[2]

Fourth, the Attorney General fails no fewer than 29 times to cite the record in support of his assertions, all of which could not be supported by the record. These 29 oversights do not even take into account the multiple times the Attorney General provides a citation to the record that does not support his assertions of fact. Many of these, but by no means all, are discussed throughout the body of this brief in the context of their relevant subject matter. Further, it does not take into account the multiple times that he fails to provide a legal citation for his assertions of law. The Attorney General's citation failures distract the Commission from its task of making a determination based on the record. Additionally, it violates the Commission Rule regarding citation to the record[3] and reveals the Attorney General's lack of record support for the positions he urges the Commission to adopt. Similarly, the Attorney General often opts to make his citation-less assertions using colorful rhetoric. But colorful rhetoric is not a substitute for diligent analysis or a legal basis for denying Santanna certification. In sum, the Attorney

[2] *Rebuttal Testimony of T. Wayne Gatlin ("Gatlin Rebuttal")*, Exs. 1.04 and 1.17.
[3] The rule is codified at 83 Ill. Adm. Code § 200.800a).

General's brief wholly fails to overcome Santanna's showing that it satisfies the prerequisites for certification.

Argument

I. THE ATTORNEY GENERAL'S THREE CITED DEFICIENCIES ARE QUICKLY AND DEMONSTRABLY UNFOUNDED.

The Attorney General identifies three perceived deficiencies in Santanna's path to certification, namely (a) Santanna fails to meet the managerial certification requirements of the AGSL; (b) Santanna fails to provide a 3-day Notice of Cancellation when making door-to-door sales; and (c) Santanna fails to comply with the Illinois Telephone Solicitation Act, 815 ILCS 413/15 (though the basis for the argument is unstated) and the federal Telemarketing Sales Rule, 16 CFR §310 (by not stating all terms and conditions prior to closing a sale). *AG Brief*, pp. 9-10. Though this reply will go into more detail later, each of the foregoing alleged deficiencies will be addressed directly up front.

A. Santanna Has Demonstrated Compliance With The Commission's Promulgated Managerial Standards.

The Attorney General posits that the unsophisticated nature of residential customers "require[s] the highest level of managerial resources and expertise." *AG Brief*, p. 9. While the factual and legal support for the Attorney General's supposition is not stated, the larger flaw is the Attorney General's disregard for the Commission's promulgated rule regarding the AGSL's managerial prerequisite. The Commission's promulgation provides as follows:

> An applicant **shall** be deemed to possess sufficient managerial capabilities to serve residential customers if it has two or more individuals in management positions with four or more years demonstrated experience in a management position with enterprise financial and administration responsibilities including profit and loss responsibilities and four years natural gas sales experience, and provides the information required in subsections (a) and (b) of this Section.

> a) The applicant shall include in its application an exhibit containing occupational background information on the persons who are being used to meet the requirements of this Section.
>
> b) The applicant shall include in its application an exhibit containing a corporate organizational chart and indicating the position of persons indicated in subsection (a) of this Section.

83 Ill. Adm. Code §551.100 (emphasis added). The Attorney General's brief does not so much as cite §551.100, let alone discuss it, and offers no criticism of the materials Santanna offered in satisfaction of the managerial prerequisite. In fact, Santanna's satisfaction of the prerequisite is uncontested.[4]

The analysis should end there. Nonetheless, the Attorney General skirts the plain language of the rule and contends that "Santanna has effectively admitted that it does not possess the expertise needed to lawfully market natural gas to residential customers by discontinuing all marketing to those customers." *AG Brief*, p. 11. For its contention, the Attorney General relies on the following testimony: "Ultimately, we temporarily suspended the residential marketing effort to focus more resources on the resolution of any outstanding issues related to the program." *Gatlin Rebuttal*, p. 7. A plain reading of this testimony reveals that Santanna made no such admission. Just the opposite of an admission of managerial inability, Santanna's decision to suspend its marketing constituted an astute decision to focus on its current customers and ensure the quality of its operations.[5]

[4] The Attorney General's contention that Santanna does not have, and "demonstrated no intention of acquiring, the managerial resources and abilities needed to qualify as an alternative gas supplier to retain customers" is an outright misrepresentation of the record. *AG Brief*, p. 11. Santanna has already demonstrated its satisfaction of the managerial prerequisite. See e.g., *Santanna Brief*, pp. 6-8 and n. 14. Further, Santanna has demonstrated its commitment to compliance with all AGSL prerequisites and all other applicable laws by making numerous improvements to its service over the course of residential marketing program. *Id*. at 3.

[5] In a classic case of "damned if you do and damned if you don't," Citizens Utility Board ("CUB") argues that Santanna erred by continuing marketing efforts by one of its marketers while demanding that the marketer address complaints of alleged misconduct, rather than ceasing marketing efforts altogether. *CUB Brief*, p. 22.

The Attorney also asserts that Santanna lacks experience providing service to residential customers.[6] *AG Brief*, pp. 11-12. This contention lacks merit for at least two reasons. First, the AGSL does not require Santanna to have had experience in marketing gas to residential customers.[7] Second, Illinois' residential gas market was monopolized until February 8, 2002, so it is unclear who, other than the utilities with the former monopolies, would have such experience marketing to Illinois residential end users. Furthermore, Santanna has gained considerable experience since the inception of its residential marketing program on March 1, 2002 (*Tr*. at 282 (Gatlin)), which, along with Santanna's service improvements, is overlooked by the Attorney General.

B. Santanna's Contract For Door-to-Door Sales Includes A 3-Day Notice Of Cancellation.

Notwithstanding his contention that Santanna fails to meet this requirement (*AG Brief*, p. 10), the Attorney General actually concedes the existence of a 3-day Notice of Cancellation in Santanna's contract. *Id*., p. 32. This should be the end of the analysis.

Nonetheless, attempting to create something that does not exist, the Attorney General mixes apples and oranges and contends that, notwithstanding the Notice of Cancellation provision, Santanna states that termination actually takes 40 to 70 days, thus violating the

[6] The Attorney General focuses on Gatlin's testimony that Santanna may not have fully understood the amount of detail that consumers may have needed to understand its storage program. *AG Brief*, p. 12. In his testimony, Gatlin was clearly referring only to the initial stages of its residential marketing efforts. *Gatlin Rebuttal*, p. 6. Additionally, the purpose of the 180-day grace period is to allow putative alternative gas suppliers the opportunity to work out any kinks in their service, which Santanna did. Further, Santanna's storage program, with its unique advantage of allowing consumer to buy gas for use in the winter at historically lower summer prices, was comparatively more complex than other offers in the marketplace. Simply because Santanna's initial efforts at explaining the program were not perfect surely cannot mean that Santanna would forever be barred from offering a residential natural gas service.

[7] Santanna has 14-15 years of experience marketing gas to commercial and industrial end users. *Gatlin Rebuttal*, pp. 3, 5. The Attorney General's contention that "Gatlin conceded" in Santanna's Application the inexperience of other Santanna executives is baseless. *AG Brief*, p. 12. The Commission's promulgations require the submission of proof that two members of a putative supplier's staff have the requisite experience. See Section I, *supra*. Santanna submitted such proof, which is uncontested, so detailing the experience of additional personnel would have been unnecessarily duplicative.

Consumer Fraud and Deceptive Business Practices Act ("CFA"). *Id.*, pp. 32-33. However, though it is true that a customer's account cannot be terminated immediately, because of utility policies rather than Santanna policies (*Gatlin Rebuttal*, p. 9; *Tr*. at 110 (Gatlin)), this has nothing to do with cancellations pursuant to the three day cancellation provisions of the Section 2(B) of the CFA. The CFA relates to cancellations of sales prior to ever actually becoming a customer, whereas Santanna's cancellation letter (see *Gatlin Rebuttal*, Ex. 1.01) is clearly directed at actual Santanna customers. Not surprisingly, the Attorney General cites no instance of a customer signing a contract with the Notice of Cancellation provision being advised by Santanna that a cancellation request would not be immediately effective.

C. Santanna's Sales Scripts Comply By Disclosing Material Prices, Terms And Conditions Prior To Closing A Sale.

Notwithstanding his conclusory opinion that Santanna's scripts fail to comply with the Illinois Telephone Solicitation Act and the Telemarketing Sales Rule (*AG Brief*, p. 10), the Attorney General never again mentions either. Accordingly, Santanna is left to wonder how it is allegedly non-compliant. The Attorney General alludes to one possibility, namely by characterizing the Telemarketing Sales Rule as requiring "a telemarketer to state all terms and conditions prior to closing a sale." *Id.*

Despite this allusion, the Attorney General nowhere in his brief contends that Santanna's sales script fails to meet this standard. To the contrary, Santanna's script plainly discloses all material terms prior to the close of a sale. See *Gatlin Rebuttal*, Ex. 1.03. Without any indication from the Attorney General that Santanna's sales script is non-compliant, Santanna is simply left to direct the Commission to the document itself.

* * *

Though the foregoing refutes each of the broad contentions made by the Attorney General, an abundance of caution compels Santanna to conduct a more point-by-point (though not exhaustive) analysis of the Attorney General's brief.

II. THE ATTORNEY GENERAL INCORRECTLY FOCUSES ITS ANALYSIS ON SUPERCEDED MATERIALS AND DATED ALLEGED CONDUCT.

The Attorney General asserts that the Commission is obligated to consider Santanna's track record of providing residential natural gas service during the 180-day grace period granted by the AGSL. *AG Brief*, p. 1. The AGSL and its related promulgations provide no guidance to support such an assertion. The AGSL's grace period does, however, instruct the Commission to give Santanna 180 days to comply with the certification prerequisites. 220 ILCS 5/19-110(b). The Attorney General's virtually exclusive focus on the materials and alleged events from the early days of Santanna's marketing efforts is inconsistent with the text of the AGSL. Santanna's early materials and conduct have some relevance but cannot be the exclusive focus of the certification issue. Review and consideration of Santanna's full "track record" reveals significant improvements to Santanna's marketing materials and efforts, resulting in unquestionable compliance with the AGSL by August 9, 2002, the date by which the AGSL expressly granted Santanna to demonstrate compliance. The Attorney General's criticism of Santanna's materials in use by August 9, 2002, to the extent he offered criticism, is unsupportable, as set forth *infra*.

III. THE ATTORNEY GENERAL'S OTHER CONCERNS ARE UNFOUNDED AND DO NOT PRECLUDE CERTIFICATION.

A. The Importance The Attorney General Places On The Number Of Cancellations Is Misplaced.

The Attorney General contends that there is significance in the number of Santanna customers who cancelled during the grace period. *AG Brief*, p. 5. The record indicates that the

number of Santanna's residential cancellations was on par with the number of cancellations Santanna typically receives in the commercial market. *Gatlin Rebuttal*, p. 20. Further, the Attorney General ignores the fact that CUB's media blitz regarding negative, and incorrect, information about Santanna occurred just prior to a significant increase in the number of cancellations. *Id*. at 21. More importantly, the Attorney General offers no evidentiary perspective for his conclusion, i.e., he offers nothing to show that Santanna experienced a higher cancellation rate than any other alternative gas supplier.

B. Santanna Adequately Prepared To Offer Service To The Residential Market.

The Attorney General asserts that Santanna did not prepare for offering service to residential consumers. *AG Brief*, p. 13. The Attorney General attempts to support its position by citing Gatlin's testimony that he did not personally review some of the applicable laws. *Id*. The Attorney General errs in making his assertion in at least two ways. First, neither the AGSL nor its related promulgations require Gatlin personally to review the applicable laws. Second, the Attorney General's assertion is factually untrue. Santanna reviewed applicable laws.[8] *Tr*. at 65, 119. Santanna also reviewed and relied on its commercial marketing experience. *Gatlin Rebuttal*, p. 6; *Tr*. at 69, 120 (Gatlin).

Additionally, in making his contention, the Attorney General makes statements that find no support in the record whatsoever. He states, "The record indicates that prior to March of 2002, Santanna did not even bother to apprise itself of the legal duties it would assume upon initiating the marketing of its services to retail customers, and in fact had done nothing to prepare for the shift in its marketing focus." *AG Brief*, p. 13. Not only does the Attorney General's cited reference provide no support for his proposition, but the record contradicts it on the very page

[8] Gatlin also testified that Santanna periodically reviewed applicable laws to ensure compliance. See *Transcript of Hearing* ("*Tr*.") at 66.

that he cites. "There was [sic] a lot of things reviewed in looking at the marketing of natural gas to residences rather than to commercial and industrial customers."[9] *Tr*. at 69. Other parts of the record also contradict the Attorney General's assertion that Santanna did nothing to prepare. *Gatlin Rebuttal*, p. 6; *Tr*. at 117-21 (Gatlin).

C. Contrary To The Attorney General's Contention, Attaching Conditions Would Not Create An "Experiment."

The Attorney General contends that certifying Santanna with conditions would be an impermissible "experiment." *AG Brief*, pp. 2-3. As his basis, the Attorney General states that Staff's proposed conditions are "so detailed and would require so much supervision." *Id*. at 2. The Attorney General's contention is flawed in at least three respects. *First*, Staff is familiar with the nature of the conditions and its capabilities, yet reaches the opposite conclusion. *Second*, the Attorney General fails to explain how Staff's proposed conditions are "so detailed" or would "require so much supervision." *Third*, its contention does not have a factual basis because an experiment connotes something not previously tried. However, the Commission already oversees call center requirements, the most significant of Staff's proposed conditions, for alternative retail electric suppliers. See 220 ILCS 5/16-123; 83 Ill. Adm. Code §410.45. Further, the Attorney General implies that, under the proposed conditions, Santanna would not be an "independent provider." There is nothing in the proposed call center or remedial action plan recommendations that would have the Commission effectively running Santanna.[10] In fact,

[9] The Attorney General goes on to misrepresent Gatlin's testimony about the differences between marketing to commercial and residential customers. AG Br. at 13. The Attorney General states that Gatlin believed that there was no difference between marketing to commercial and residential consumers. Id. What Gatlin testified, was as follows: "I certainly would not characterize commercial and industrial customers as having a, necessarily a higher level of understanding about business than a lot of residential owners do because the people that make up those businesses are the people that live in those residences."

[10] The Attorney General makes the same illogical contention as CUB that the conditions would somehow allow the Commission to certify an otherwise unqualified supplier. *AG Brief*, pp. 2-3. The Attorney General's conclusion is unfounded. See Santanna's reply to CUB's Brief, p. 17.

Staff witness Joan Howard ("Howard") testified that Staff is not "trying to manage Santanna." *Tr*. at 511.

D. The Attorney General's Criticism Of Santanna's Written Contracts Is Inconsequential.

Critically, the Attorney General offers no criticism of Santanna's most recent contract, which was in use prior to August 9, 2002. *Tr*. at 222-23 (Gatlin); *Gatlin Rebuttal*, Ex. 1.14. Like CUB, the Attorney General labors under the misunderstanding that companies are not permitted to use different contracts. *AG Brief*, p. 14; see also, *CUB Brief*, pp. 9-12.[11] The Attorney General makes no effort to explain how the use of several different contracts prevents Santanna from satisfying any of the enumerated AGSL prerequisites to certification. Furthermore, the Attorney General cites nothing to show that Santanna is unable to keep track of its various contracts, and he cites no instance in which Santanna has misapplied any term to any customer.

E. Santanna Exercised Adequate Supervision Over Its Marketers.

The Attorney General contends that Santanna delegated nearly all of its responsibility for training marketing employees to the companies for which they worked. *AG Brief*, pp. 16-17. Aside from the fact that Santanna did actually provide training materials to its marketers (*Gatlin Rebuttal*, Ex. 1.17; *Tr*. at 152, 156 (Gatlin)), the Attorney General overlooks the fundamental reason why companies hire professional telemarketers, i.e., their specialized skills and experience to market goods and services. Certainly, the Attorney General would not expect

[11] The differences between the contracts were minor. See CUB Gatlin Cross Ex. 15. The Attorney General wrongly claims that there were a "wide variety" of "cancellation periods, cancellation fees, administrative fees, 'cash out' formulas and arbitration clauses." *AG Brief*, p. 14. However, the contracts plainly expose the blatent falsity of the Attorney General's argument. The contracts reveal two cancellation periods (90 days and 60 days), two early termination fees (one formulaic and one a flat $100), two administrative fees ($0 and $3), one cash-formula (90% of NGI index) and one arbitration clause. CUB Gatlin Cross Ex. 15. Moreover, the record clearly shows that Santanna has never imposed any early termination fees. *Gatlin Rebuttal*, p. 13; *Tr*. at 300 (Gatlin).

Santanna to train its plumber, electrician, cleaning people or the pipeline employees that transport the gas Santanna sells. Santanna's role is to provide its marketers with the information necessary for the marketers to perform their function. Santanna did so. *Id*.

Additionally, Santanna's contracts with marketers require the marketers to "conduct themselves in a professional manner," "adhere to client approved scripts and not deviate in a manner that alters the authorized offer," and "monitor and assure that the representations of its staff to prospective clients, and all others, are accurate representations of the program furnished and approved by Santanna." AG Cross Ex. 4 (SES ICC 362-63). Additionally, Santanna supplied marketers with utility rules of conduct as a training measure.[12] *Gatlin Rebuttal*, Ex. 1.17. Furthermore, as the record shows, concerns about marketers stemmed from "bad apples" rather than systemic training problems. See CUB Gatlin Cross Exs. 4, 6, and 14; *Gatlin Rebuttal*, Ex. 1.15. Finally, even if training responsibilities were delegated, it provides no indication that the sales force was not trained, regardless of who provided the formal training.

The Attorney General next contends that Santanna did not exercise proper oversight or monitoring of its marketers. *AG Brief*, pp. 16-19. This contention is disproved by the very documents relied upon by the Attorney General and CUB at hearing. Santanna's e-mails showed that it diligently worked with its marketers to address issues as they arose:

> "Once you [marketing company] identify the individual responsible for the sale of this account, [Santanna] would like them suspended from going into the field and representing [Santanna] until you have fully investigated the incident and either cleared their name or terminated their employment due to the incident being true." CUB Gatlin Cross Ex. 12 (SES ICC 198; e-mail from Santanna to marketing company);
>
> "The agents involved with this customer were Michael Dickens and Shamond Spencer. They were both fired by our office manager on 06/20/2002, for not following our rules and conduct codes…. This complaint will be addressed to all existing agents, to impress that any complaints of this type will mean immediate

[12] Santanna did not conduct door-to-door marketing in Peoples territory. *Gatlin Rebuttal*, Ex. 1.17.

termination." CUB Gatlin Cross Ex. 6 (SES ICC 201; e-mail from marketing company to Santanna);

"Allegedly, you have a young black man in St. Charles that went to the home of [redacted] stating that he was from Nicor Gas today. Please make sure that none of your reps misrepresent themselves in this manner." CUB Gatlin Cross Ex. 4 (SES ICC 172; e-mail from Santanna to marketing company);

"I'm glad to see that you saw the problem and took care of it. Unfortunately, [Santanna] is left with the ramifications. Based on that, my corporate office has told me that with the next complaint, regardless of what it is, we are going to require taped verification for every sale that you make." CUB Gatlin Cross Ex. 6 (SES ICC 201; e-mail from Santanna to door-to-door marketing company);

"This is the second complaint both in CCI [marketing company] exclusive towns. Please make sure that this is the last or we will have to consider terminating our business relationship." CUB Gatlin Cross Ex. 10 (SES ICC 165; e-mail from Santanna to marketing company);

"Customers are telling [Santanna] that the reps are stating that [Santanna] will mail back the Nicor bill in a couple of weeks after they leave with it…. Please make sure that they stop making promises that we can't keep." CUB Gatlin Cross Ex. 11 (SES ICC 191; e-mail from Santanna to marketing company);

"Every complaint on this list is CCI, none from the other two companies doing this work for [Santanna]…. Please make sure that we are adhering to the scripts and rules…. [The complaints] must stop." CUB Gatlin Cross Ex. 13 (SES ICC 182; e-mail from Santanna to marketing company);

"That is the first complaint we have had from that rep…. Additionally, this complaint was made before the 13th's mandatory suspension/retraining…. This rep does always wear T-shirts and ID badges that say 'Santanna Energy Services.' Regardless of his track record, though, this representative will be pulled, counseled and re-trained in response to his complaint…. Aside from the reprimand to the representative, I've made it clear to the Area Manager and Crew Manager for that rep that these types of complaints must stop and only jeopardize our relationship." CUB Gatlin Cross Ex. 14 (SES ICC 192; e-mail from marketing company to Santanna).

"The President of [Santanna] needs to see the documentation that you are using (detailed, itemized write up). He has a fear that companies that we are working with may not be adhering to our scripting. He will suspend efforts if he is not satisfied with the write up that you provide. Please get this info to me ASAP.

* * *

I have been asked by the President of [Santanna] to make sure that the companies working door to door for [Santanna] run a more squeaky clean program than they

> have ever done before, regardless of how much monitoring and hammering it takes. All the second chances are used up. You need a detailed, itemized write up from you on the way the program, scripting, documentation, dress (detail), monitoring, verification, hours, days, etc.. We need to add a Santanna hat to the wardrobe. Outer wear will not cover a hat. Make it clear to your people that [Santanna] have to have **an extreme in the over kill from the new beginning forward**." CUB Gatlin Cross Ex. 9 (SES ICC 217; emphasis in the original; two e-mails from Santanna to marketing company).

In contrast to the Attorney General's mere rhetoric, these specific examples from the record, taken from the Attorney General's and CUB's own exhibits, demonstrate Santanna's commitment to supervision and specific examples of that supervision.

Additionally, these examples defeat the Attorney General's contention that Santanna never disciplined any marketer. *AG Brief*, pp. 22-23. The Attorney General's insinuation that Santanna threatened discipline but never acted on it (*id*. at 23), while false, also fails to appreciate that the short time period involved within which any alleged conduct occurred, Santanna gained knowledge of such allegations and a plan to rectify the situation could be carried out. As Gatlin testified, Santanna justifiably believed for some time that it was dealing with a few "bad apples" and was trying to investigate the occurrences to determine an appropriate course of action. *Tr*. at 278-79.

The Attorney General cites an e-mail from Santanna to a marketer threatening to terminate the relationship if there was another complaint of a representative posing as a Nicor employee as proof that Santanna never carried out any threats to terminate its contracts with marketers. *AG Brief*, pp. 23-24. First, Santanna did not say that it would terminate the marketer if there was another complaint; only that it would consider it. CUB Gatlin Cross Ex. 10. Second, the record contains no indication of an additional complaint of that nature involving this marketer that would invoke Santanna's "threat."

The Attorney General presumptuously asserts that Santanna should have fired CCI, a marketing company, based solely on the contents of a list of complaints regarding CCI marketers. *AG Brief*, p. 24 (discussing CUB Gatlin Cross Ex. 3). In addition to presuming to know how to best run Santanna's business, the Attorney General fails to consider that the list contains only 14 complaints. The Attorney General draws its conclusion without any analysis of (1) whether the nature of the complaints would justify terminating the marketer, such that Santanna would not be breaching its contract with the marketer; (2) whether the number of complaints justifies termination given the volume of the marketer's consumer contacts; and (3) whether the results of the marketer's investigations and Santanna's investigations showed that termination was justified. The Attorney General's argument, without analysis, is overlooks real-world commerce and the ramifications to Santanna if it engaged in the reactionary responses that the Attorney General thinks should have been automatic.

Significantly, the Attorney General's does not provide any evidence, or even argue, that Santanna's training, supervision or monitoring fell below industry norms or any applicable AGSL standard. Nor does the Attorney General attempt to support factually its statement that providing scripts and marketing materials is insufficient to train a marketing sales force (*AG Brief*, p. 17), especially a sales force not directly hired by Santanna. Further, the undisputed evidence was that Santanna not only provided the information and documents necessary to train marketers to sell Santanna's program, but also reviewed that material with the marketing companies and was fully available for follow-up regarding the material. *Gatlin Rebuttal*, Ex. 1.17. Moreover, Santanna regularly provided additional education materials to its marketers. See *Gatlin Rebuttal*, p. 7.

The Attorney General states that "evidence was presented at hearing that Santanna allowed its door-to-door marketers to modify its materials with only cursory oversight by the company." *AG Brief*, p. 14, 17. This is untrue and unsupported by the record. *First*, the testimony at hearing was that Santanna wanted to see any suggested (i.e., not enacted) modifications that one particular marketer may make.[13] *Tr*. at 164. *Second*, Gatlin testified that the mention of modification referred "to the script if they encountered needing to speak with someone about the bad press that we had encountered. It did not refer to the sales script or the verification scripts at all." *Id*. at 63. As such, the Attorney General has not shown that this evidence is indicative of lax oversight.

The Attorney General contends that "Santanna apparently allowed CCI [marketing company] to modify and employ a contract form without obtaining Santanna's authority to do so," which resulted in a contract that Santanna allegedly never saw. *AG Brief*, p. 18. In the very next sentence, the Attorney General argues that Santanna irresponsibly delegated the authority to modify its contract. *Id*. The contradiction is obvious: how could Santanna have delegated the authority and not granted such authority? In further support of its argument, the Attorney General asks, "Why would Santanna take the change to review only a 'condensed version' of the [allegedly revised] script?" *Id*. The clear answer is that the Attorney General, once again, mischaracterizes the record. The evidence shows that Santanna did not delegate any authority; it actually demanded that any revisions suggested by the marketer must be cleared with Santanna. CUB Gatlin Cross Exs., 9, 17. The record further shows that the "condensed version" referenced is not simply a summary of a revised script to be submitted to Santanna for its reference, but rather an entirely new script that is merely a "condensed version" of the script then in place. *Tr*.

[13] Additionally, the reference is to a telemarketer, and not a door-to-door marketer, as the Attorney General represents. See *AG Brief*, p. 17.

at 164. Unfortunately, this demonstrates the pitfalls of admitting into evidence hearsay documents without the author in the room to question.

Additionally, even the Attorney General's conjectural argument does not hold up under scrutiny. His contention is built upon the suppositions that Santanna never approved the contract before it was used and never produced it in discovery.[14] *Id*. at 18. To the contrary, Santanna produced the contract containing a "customer awareness" section during discovery. See CUB Gatlin Cross Ex. 15 (SES ICC 002). Additionally, Santanna had provided the language for the "customer awareness" section (see AG Gatlin Cross Ex. 4), and the modification referenced in the e-mail relied upon by the Attorney General pertained to changes in formatting, not text. CUB Gatlin Cross Exs. 15 and 16; *Tr*. at 244-45 (Gatlin). Moreover, the Attorney General did not show, or even attempt to show, that the contract with the "customer awareness" section failed to meet any AGSL standards. In fact, it is unclear how the "customer awareness" section was not actually an improvement to the contract.

The Attorney General contends that Santanna did not randomly listen in on telemarketing calls. *AG Brief*, p. 20. In support of his contention, the Attorney General relies on Gatlin's testimony that he did not know how often Santanna randomly listened to calls. *Id*. (citing *Tr*. at 158). However, the uncontroverted evidence is that Santanna did randomly listen to calls. *Gatlin Rebuttal*, p. 14 and Ex. 1.17. Whether the president of a company, presumably not manning the phones, knows how often the monitoring occurs is says nothing of whether such monitoring occurred (or how often it occurred, for that matter).

[14] The Attorney General asserts that Santanna "claim[ed] to be unfamiliar" with the contract used in CUB Gatlin Cross Ex. 16. *AG Brief*, p. 19. It is not clear which contract the Attorney General is referring to because there are three different contract forms in that exhibit. Santanna was actually familiar with all of them because Santanna supplied them to its marketers. *Gatlin Rebuttal*, Ex. 1.17; see also AG Gatlin Cross Ex. 4.

The Attorney General next contends that Santanna decided to suspend its marketing operations because it was "[u]nwilling or unable to control its agents."[15] *AG Brief*, p. 20. This is an extraordinary unsupportable statement – and, of course, the Attorney General provides no citation. Nothing in the record even suggests that Santanna suspended its marketing because it could not control its marketers. The uncontradicted evidence is that Santanna suspended its marketing to focus on its current customers, ensuring the quality of its operations and addressing this resource-intensive proceeding. *Gatlin Rebuttal*, p. 7; *Tr*. at 200-01.

The Attorney General attempts to make much over Gatlin's written testimony that he was aware of only a single incident involving a door-to-door marketer allegedly posing as a Nicor employee. *AG Brief*, p. 21. While the Attorney General tried to show that Gatlin contradicted this testimony at hearing, all he could show was that, at hearing, Gatlin became aware of several additional allegations. This does not, in any way, contradict his state of knowledge at the time of his written testimony. Furthermore, Santanna has more than 55 employees. *Gatlin Rebuttal*, p. 17. If Gatlin could perform every task at Santanna and reviewed every file, he would not need to hire all those other people. Further, the complaints with which Gatlin was confronted at hearing were comprised of a handful of unsubstantiated allegations, which hardly shows Santanna's non-compliance with any AGSL prerequisite.

The Attorney General contends that consumers made "numerous" allegations regarding Santanna door-to-door marketers use of surveys, petitions and price quotes. *AG Brief*, p. 21. Ironically, given the apparent availability of "numerous" complainants, the Attorney General

[15] The Attorney General goes on to gratuitously state that Santanna believes that its current legal proceedings will mark the end of its regulatory problems. *AG Brief*, p. 20. The Attorney General's conclusion is patently unsupported by the record to which he cites (not to mention irrelevant to the pending matter). Indeed, it is a near certainty that if Santanna is granted certification, CUB and the Attorney General will keep an extraordinarily watchful eye over Santanna, to say the least.

submitted for the record not a single piece of evidence supporting such a claim. The Attorney General's conclusion that Santanna violated the AGSL's verifiable authorization requirement is similarly flawed. On the other hand, Santanna provided proof of verifiable authorizations. *Tr.* at 305-12 (Gatlin), 348-58 (Kolata), 404-06 (Kolata) and 422-23 (Kolata); Gatlin Redirect Ex. 2; Santanna Kolata Cross Ex. 7; *Gatlin Rebuttal*, pp. 12-13. Even assuming *arguendo* that some instances are true, the Attorney General fails to cite evidence that such conduct was not isolated to a limited few marketers.

F. Santanna's Call Center Was Adequate Prior To The Expiration Of The 180-day Grace Period.

The Attorney General contends, again without support, that the "adequate" number of customer service representatives answering telephones is the number necessary to answer the number of incoming telephone calls. *AG Brief*, p. 25. For starters, the AGSL and its promulgations do not require that each call be answered.[16,17] Further, it is not clear what "answer" means -- whether a live person would be required, or whether an automated system is adequate -- under the Attorney General's hypothesized requirement. The record reflects that neither Gatlin nor Howard could provide any insight on the issue. *Gatlin Rebuttal*, pp. 31-32; *Tr.* at 515-16 (Howard).

Noticeably missing from the Attorney General's discussion of Santanna's customer service capabilities is a discussion of the numerous improvements it made during the 180-day grace period and its capability by the end of the grace period. *AG Brief*, pp. 25-26. Santanna significantly increased staffing, almost tripled the number customer service phones lines,

[16] That is not to say Santanna does not strive to do exactly that, as it has historically done. *Gatlin Rebuttal*, pp. 7, 29.

[17] Neither the AGSL nor its related promulgations require a call center, as is required for alternative retail electric suppliers. See 83 Ill. Adm. Code §410.45. Nonetheless, even those stringent standards do not require that each call be answered.

installed a call-answering system and expanded customer service hours. See *Santanna Brief*, p. 3; see also *Gatlin Rebuttal*, pp. 29-30. Moreover, Santanna made significant changes to its marketing materials, which should reduce the number of incoming calls, which largely reflected a misunderstanding of Santanna's storage program that is now more completely described. *Gatlin Rebuttal*, pp. 29-30.

The only criticism of Santanna's more recent customer service capabilities is to say that Howard testified that "Santanna's call center policy is insufficient to meet the requirements set out in her direct testimony." *AG Brief*, p. 26. Not surprisingly, the Attorney General mischaracterizes Howard's testimony, which was as follows:

> Q. Despite the fact that you agreed that Santanna had been cooperative and willing to help, do you think that all of your concerns and problems with respect to Santanna have now been satisfied?
>
> A. No. In fact, that's the very reason that the recommendations I did make included remedial action plan, and I would think that such a plan would help ensure that cooperation continues.

Tr. at 526. Clearly, Howard did not testify that Santanna did not meet the requirements but rather stated that her concerns were not fully allayed. Indeed, Howard specifically testified that she had no opinion on whether certification should be granted. *Id*. at 522.

G. Santanna's Verification Procedures Are Sufficient.

The Attorney General Contends that Santanna failed to comply with 220 ILCS 5/13-902, which is a portion of the Public Utilities Act applicable to telecommunication customers. *AG Brief*, pp. 26-30. This portion of the Public Utilities Act plainly has no application here, and the Attorney General provides no support to the contrary. Undeterred, the Attorney General devotes almost five pages of its brief to discussing Santanna's alleged non-compliance with a statute that does not apply to it. *Id*. at 26-30. Indeed, the Attorney General faults Santanna for its apparent

lack of understanding of §902's incorporation into Illinois law. *Id*. at 30. The Attorney General's assessment of Santanna's lack of knowledge is, to be diplomatic, shocking, given that the Attorney General is the State's top law enforcement officer, and yet he seeks to impose a wholly inapplicable law upon Santanna. The end result is that the Attorney General identifies nothing in Santanna's verification procedures that is not AGSL-compliant.[18]

H. Santanna Adequately Disclosed The Prices, Terms and Conditions Of Its Service.

The Attorney General asserts that Santanna did not sufficiently disclose the price, terms and conditions of its service. *AG Brief*, pp. 30-32. The Attorney General's criticism is erroneous for at least three reasons. *First*, it fails to level any substantive of Santanna's most recent marketing materials, which were in use prior to August 9, 2002. *Second*, it fails to take into account the collective disclosures made in Santanna's telemarketing script, verification script, contract and welcome letter, which are discussed at length in Santanna's Brief and were disclosed to prospective customers prior to switching their gas service. *Santanna Brief*, pp. 9-17. *Third*, the Attorney General's assertions are factually unsupportable or were wrongly derived. The Attorney General states that the existence of customer complaints about their gas bills being higher than their previous bills means that Santanna did not adequately explain its program. *AG Brief*, p. 31. The Attorney General's assumption does not take into account other equally, if not more, plausible explanations. As Howard testified, confusion can result even when disclosures are adequate. *Tr*. at 508. Santanna proved at hearing that several complainants' allegations turned out not to be true. *Santanna Brief*, pp. 22-23. As Gatlin testified, whether complainants

[18] Despite requesting verifications for more than 100 consumers (between CUB and the Attorney General) (*Gatlin Rebuttal*, p. 13), neither presented evidence of a single instance of an unauthorized verification, instead relying on mere allegations. The Attorney General's argument about marketers having incentive to slam (*AG Brief*, p. 30) is, therefore, baseless. Moreover, it is a farce, because it ignores the fact that if a consumer is enrolled but does not remain a customer, the marketers do not get paid. *Gatlin Rebuttal*, Ex. 1.17; AG Gatlin Cross Ex. 4.

have poor memories or are fabricating, the Attorney General's assumption is unfounded, particularly in light of his failure to offer the testimony of even a single complainant.[19]

Undermining the Attorney General's entire argument about allegedly deficient disclosures is the general absence of what it is the he thinks Santanna should, or should not have, disclosed. See *AG Brief*, pp. 30-33. For instance, the Attorney General believes Santanna should have better disclosed its storage program. *Id*. at 32 ("[t]he only contract form that does discuss Santanna's billing for storage, does not provide enough information"). Yet, there is no hint of what it is about the storage program Santanna should, or should not have, disclosed. To the contrary, Santanna's materials explicitly explain the storage component of Santanna's service. See e.g., *Gatlin Rebuttal*, Exs. 1.03, 1.04, 1.12, 1.14 and 1.18. Accordingly, the Attorney General's unexplained assertions carry no weight.

In what appears to be the only example of allegedly inadequate disclosure, the Attorney General contends that Santanna should have disclosed "the extent to which customer's [sic] summer gas bills will increase under Santanna's unique billing methods." *AG Brief*, p. 32. *First*, the Attorney General cites no requirement that such a disclosure be made. *Second*, notwithstanding that, Santanna did disclose the impact on customers' bills. The following are some examples:

> Your summer bills will be higher than usual but this should result in lower winter bills. *Gatlin Rebuttal*, Ex. 1.03 (current telemarketing script)
>
> Your summer bills will be higher than normal. *Id*., Ex. 1.12 (current verification script)
>
> For this reason [buying gas in the summer at historically lower prices for use in the winter], your summer bills should be significantly higher than you are used to seeing. *Id*., Ex. 1.04 (welcome letter)

[19] Undue reliance on the number of cancellations is unwarranted. Gatlin testified that no less than a 10-11% cancellation rate is to be expected. *Gatlin Rebuttal*, p. 20. Further, CUB's witness David Kolata acknowledged that any number of factors could motivate gas user to cancel his/her enrollment with Santanna. *Tr*. at 365-66, 370.

> As indicated, because of your start date, NICOR requires that you receive a substantial portion of your total storage in the summer, which you will notice on your upcoming invoice. Please don't be alarmed. The storage component results in your (1) paying more dollars for gas in the summer, because you buy more gas, but historically at a lower price and (2) less dollars in the winter than normal, because you buy less gas during that historically higher priced time of the year. *Id*., Ex. 1.18 (follow-up letter).

Further, the Attorney General ignores the fact that Santanna cannot predict the extent bills will increase because it does not have the information to make an accurate prediction of future bills. *Id*. at 21.[20]

The Attorney General also contends that Santanna's marketing materials attached to Gatlin's Rebuttal testimony did not adequately disclose the "cash out terms and conditions" of Santanna's service (albeit failing to differentiate between current and superceded materials). *AG Brief*, pp. 31-32, 34-35. The record demonstrates the falsity of the Attorney General's contention, particularly with regard to the cash out (storage credit) rate. The current sales script provides that customers will be credited at 90% of the NGI index rate on the date that Nicor or Peoples switch the customer from Santanna. *Gatlin Rebuttal*, Ex. 1.03. The current welcome letter reiterates this same information. *Id*., Ex. 1.04. The current contract provides the same information. *Id*., Ex. 1.14. The Attorney General's insinuation that customers may be dissatisfied by getting better terms from Santanna than originally disclosed is nonsensical. *AG Brief*, p. 35.[21]

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[20] Santanna's lack of a crystal ball also precludes it from disclosing to customers that their bills may "increase by several hundred percent," as the Attorney General would have Santanna do. *AG Brief*, pp. 33-34. Additionally, the Attorney General cites no basis for the percentage level indicated.

[21] The Attorney General's argument here highlights his lack of objectivity and credibility in assessing whether Santanna is good for the Illinois marketplace. The Attorney General is correct that Santanna has provided storage credits to customers at rates different than their agreements dictate. This decision was made to benefit customers. *Gatlin Rebuttal*, p. 9; *Tr*. at 111-13 (Gatlin). Yet, the Attorney General gives lends no credence to a company "doing the right thing." It seems quite unlikely, however, that any former Santanna customers will be suing Santanna for breach of contract to return excess money given to them by Santanna.

The Attorney General places great weight in his contention that Santanna signed up many customers using superceded materials that he considers deficient under the AGSL. *AG Brief*, p. 34. This reflects the Attorney General's disproportionate emphasis on superceded materials, albeit the AGSL allows a grace period. Regardless, the Attorney General fails to show that Santanna's materials, especially taken collectively, were deficient under the AGSL. Furthermore, the AGSL provides recourse for prior alleged misconduct, as is demonstrated by CUB's separate complaint against Santanna (Docket No. 02-0425), to which the Attorney General is a party. Perhaps more importantly, however, is the customers' ability to cancel service with Santanna if they are dissatisfied, exactly the free-market discipline the Commission contemplated when deregulating the residential gas market. See *Citizens Utility Board Request for an Investigation Into the Current Structure of the Nicor Customer Select Pilot Program*, Consolidated Docket Nos. 00-0620, 00-0621, 2001 Ill. PUC Lexis 753, *16, 30 (July 5, 2001).[22] As of August 22, 2002, however, Santanna had more than 38,000 residential customers. *Gatlin Rebuttal*, p. 4.

IV. DENYING SANTANNA CERTIFICATION WILL HARM THE COMPETITIVE NATURE OF THE RESIDENTIAL MARKET.

The clear purpose of opening the residential gas market was to foster competition. See *Citizens Utility Board Request for an Investigation Into the Current Structure of the Nicor Customer Select Pilot Program*, Consolidated Docket Nos. 00-0620 and 00-0621, 2001 PUC Lexis 753, *30 (July 5, 2001). The Attorney General takes the position that Santanna's certification would be detrimental to the competitiveness of the residential market. *AG Brief*, p. 2. The most prominent feature of this position is lack of factually support. The Attorney

[22] Notwithstanding the Attorney General's belief that the option of cancellation is Santanna's "mantra," the cited ruling clearly indicates the Commission's agreement that such an option is an important regulator in the residential natural gas market.

General speculates about the proclivity of consumers to participate in the Customer Select and Choices For Your programs because of their Santanna experience. *Id*. He speculates about consumers making irrational decisions and concluding that the market is "too risky for 'the little guy.'"[23] *Id*.

As of August 22, 2002, the proclivity of more than 38,000 consumers was to continue as Santanna customers. *Gatlin Rebuttal*, p. 4. Notwithstanding the decision by many consumers to terminate their agreement to buy gas from Santanna, the record does not reflect why they cancelled. Indeed, they could have cancelled for any numbers of reasons, up to and including a simple change of mind. *Gatlin Rebuttal*, p. 20; *Tr*. at 370 (Kolata). While the Attorney General concludes that each Santanna cancellation was due to a consumer's dissatisfaction with Santanna (*AG Brief*, pp. 5, 36), the record does not allow for that conclusion.

The Attorney General also fails to address the impact of thwarting the choice of those 38,000+ consumers to be Santanna customers, let alone the process for return them to their local utility.

Conclusion

Santanna readily acknowledges that its early marketing materials left something to be desired, as reflected by the number of consumer complaints. *Gatlin Rebuttal*, pp. 4-5. However, it has made tremendous strides in improving its materials in an extraordinarily short timeframe. *Gatlin Rebuttal*, pp. 6-7, 30, 32. Santanna has risen to the challenge of offering a unique and beneficial service to residential gas users in Illinois in a newly-opened residential market, and not one of the other parties to this proceeding acknowledges in their respective briefs either the improvements Santanna has made or the willingness Santanna has shown to address any concern raised. Moreover, none of the parties acknowledges, despite uncontested evidence to the

[23] The meaning of the quoted text is unclear, and, in any event, is factually unsupported.

contrary, that Santanna's program is more beneficial to residential gas users than any other program in the marketplace. It does not require users to buy more gas on an annual basis; it simply allows them to buy more gas when it is less expensive, so they do not experience the double shock of gas bills in the winter, i.e., combining high winter prices with high winter usage.

For the reasons stated herein and in Santanna's opening brief, the Commission should grant Santanna a certificate of service authority.

SANTANNA NATURAL GAS CORPORATION,

By: _____
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Dated: September 26, 2002

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